

1  
2  
3  
4  
5  
6  
7  
8 **UNITED STATES DISTRICT COURT**  
9 **SOUTHERN DISTRICT OF CALIFORNIA**  
10

11 DAVID WAYNE WILSON,  
12 CDCR #K-66474,

13 Plaintiff,

14 vs.  
15

16 D. PARAMO, Acting Warden; T. KABBAN-  
17 MILLER, Chief Deputy Warden; ALAN  
HERNANDEZ, Assoc. Warden;  
18 G. SAVALA, Captain; E. GARCIA, Captain;  
V. SOSA, Correctional Counselor;  
19 A. ALLAMBY, Lieutenant; SUZAN L.  
HUBBARD, Director of Adult Institutions;  
20 GEORGE A. NEOTTI, X-Warden; SARA  
MOLONE, Ombudsman of Dept. of  
21 Corrections; D. FOSTON, Chief Inmate  
Appeals; A. CHRISTIAN, Sergeant,

22 Defendants.  
23  
24

Civil No. 11-1905 LAB (WVG)

**ORDER:**

**(1) DENYING MOTION TO  
PROCEED *IN FORMA PAUPERIS*  
AS BARRED BY 28 U.S.C. § 1915(g)**

**[ECF No. 5]**

**AND**

**(2) DISMISSING CASE FOR  
FAILURE TO PAY FILING  
FEE REQUIRED BY  
28 U.S.C. § 1914(a)**

25 Plaintiff, a state prisoner currently incarcerated at Richard J. Donovan Correctional  
26 Facility ("RJD") and proceeding pro se, has filed a civil rights action pursuant to 42 U.S.C.  
27 § 1983. Plaintiff seeks to sue a host of RJD and California Department of Corrections and  
28 Rehabilitation officials on grounds that they retaliated against him and denied his rights to equal

1 protection, due process and to be free from cruel and unusual punishments in October 2010 and  
 2 July 2011 by inadequately responding to his complaints demanding the “recall” of RJD’s Men’s  
 3 Advisory Council (“MAC”), placing him in the Administrative Segregation Unit (“ASU”), and  
 4 conspiring to deny him witnesses, vitamins, protein supplements, eye drops, socks, underwear,  
 5 writing paper and recreational reading material. *See* Compl. at 5-7.

6 Plaintiff has not prepaid the civil filing fee required by 28 U.S.C. § 1914(a); instead, he  
 7 has filed a Motion to Proceed *In Forma Pauperis* (“IFP”) pursuant to 28 U.S.C. § 1915(a) [ECF  
 8 No. 5].

# **I.**

## **Motion to Proceed IFP**

11 Section 1915 of Title 28 of the United States Code allows certain litigants to pursue civil  
 12 litigation IFP, that is, without the full prepayment of fees or costs. 28 U.S.C. § 1915(a)(2).  
 13 However, the Prison Litigation Reform Act (“PLRA”) amended section 1915 to preclude the  
 14 privilege to proceed IFP:

15 . . . if the prisoner has, on 3 or more prior occasions, while  
 16 incarcerated or detained in any facility, brought an action or appeal  
 17 in a court of the United States that was dismissed on the grounds  
 18 that it is frivolous, malicious, or fails to state a claim upon which  
 relief can be granted, unless the prisoner is under imminent danger  
 of serious physical injury.

19 28 U.S.C. § 1915(g). “This subdivision is commonly known as the ‘three strikes’ provision.”  
 20 *Andrews v. King*, 398 F.3d 1113, 1116 n.1 (9th Cir. 2005) (hereafter “*Andrews*”). “Pursuant to  
 21 § 1915(g), a prisoner with three strikes or more cannot proceed IFP.” *Id.*; *see also Andrews v.*  
 22 *Cervantes*, 493 F.3d 1047, 1052 (9th Cir. 2007) (hereafter “*Cervantes*”) (under the PLRA,  
 23 “[p]risoners who have repeatedly brought unsuccessful suits may entirely be barred from IFP  
 24 status under the three strikes rule[.]”). The objective of the PLRA is to further “the  
 25 congressional goal of reducing frivolous prisoner litigation in federal court.” *Tierney v. Kupers*,  
 26 128 F.3d 1310, 1312 (9th Cir. 1997).

27 ///

28 ///

1 “Strikes are prior cases or appeals, brought while the plaintiff was a prisoner, which were  
 2 dismissed on the ground that they were frivolous, malicious, or failed to state a claim,”  
 3 *Andrews*, 398 F.3d at 1116 n.1 (internal quotations omitted), “even if the district court styles  
 4 such dismissal as a denial of the prisoner’s application to file the action without prepayment of  
 5 the full filing fee.” *O’Neal v. Price*, 531 F.3d 1146, 1153 (9th Cir. 2008). Once a prisoner has  
 6 accumulated three strikes, he is prohibited by section 1915(g) from pursuing any other IFP action  
 7 in federal court unless he can show he is facing “imminent danger of serious physical injury.”  
 8 *See* 28 U.S.C. § 1915(g); *Cervantes*, 493 F.3d at 1051-52 (noting § 1915(g)’s exception for IFP  
 9 complaints which “make[] a plausible allegation that the prisoner faced ‘imminent danger of  
 10 serious physical injury’ at the time of filing.”).

## 11 II.

### 12 Application of 28 U.S.C. § 1915(g)

13 As an initial matter, the Court has carefully reviewed Plaintiff’s Complaint and has  
 14 ascertained that there is no “plausible allegation” to suggest Plaintiff “faced ‘imminent danger  
 15 of serious physical injury’ at the time of filing.” *Cervantes*, 493 F.3d at 1055 (quoting 28  
 16 U.S.C. § 1915(g)). As noted above, Plaintiff’s pleading contains a litany of grievances and  
 17 comprises voluminous exhibits all cataloguing his attempts in 2010 to unseat fellow inmates  
 18 assigned to RJD’s MAC based on allegations of racial discrimination. (Compl. at 5.) Plaintiff  
 19 contends that in reprisal for these grievances and other litigation activity, he was placed in ASU  
 20 in July 2011, denied access to confidential witnesses during a disciplinary hearing and subject  
 21 to various other restrictions on his access to medical “appliances” and the prison law library.  
 22 (*Id.* at 6-7.)

23 A court “‘may take notice of proceedings in other courts, both within and without the  
 24 federal judicial system, if those proceedings have a direct relation to matters at issue.’” *Bias*  
 25 *v. Moynihan*, 508 F.3d 1212, 1225 (9th Cir. 2007) (quoting *Bennett v. Medtronic, Inc.*, 285 F.3d  
 26 801, 803 n.2 (9th Cir. 2002)); *see also United States ex rel. Robinson Rancheria Citizens*  
 27 *Council v. Borneo, Inc.*, 971 F.2d 244, 248 (9th Cir. 1992). Thus, this Court takes judicial  
 28 notice that Plaintiff David Wayne Wilson, aka David W. Wilson, CDCR #K-66474, has had at

1 least eight prior prisoner civil actions dismissed on the grounds that they were frivolous,  
2 malicious, or failed to state a claim upon which relief may be granted.

3 They are:

4 1) *Wilson v. Yarbrough*, Civil Case No. 2:02-cv-08293-UA-RNB (C.D. Cal., West.  
5 Div.- Los Angeles Feb. 26, 2003 Order denying leave to proceed IFP and dismissing action as  
6 “legally and/or factually frivolous” [ECF No. 4]) (strike one);

7 2) *Wilson v. Schwartz, et al.*, Civil Case No. 2:05-cv-01649-GEB-CMK (E.D. Cal.  
8 Sept. 26, 2006 Findings & Recommendations (“F&Rs”) re Dismissal for failing to state a claim  
9 [ECF No. 24]); (E.D. Cal. October 31, 1006 Order Adopting F&Rs and Dismissing Action  
10 [ECF No. 26]) (strike two);

11 3) *Wilson v. Veal, et al.*, Civil Case No. 2:06-cv-00067-FCD-KJM (E.D. Cal. May  
12 8, 2007 F&Rs re Dismissal as frivolous and for failure to state a claim [ECF No. 9]); (E.D. Cal.  
13 June 4, 2007 Order Adopting F&Rs and Dismissing Action [ECF No. 11]) (strike three);

14 4) *Wilson v. Dovey, et al.*, Civil Case No. 2:06-cv-01032-FCD-EFB (E.D. Cal. Dec.  
15 20, 2006 F&Rs re dismissal of action for failing to state a claim [ECF No. 11]); (E.D. Cal.  
16 March 8, 2007 Order adopting F&Rs and dismissing action for failure to state a claim [ECF No.  
17 13]) (strike four);

18 5) *Wilson v. Zafra, et al.*, Civil Case No. 2:06-cv-01577-FCD-KJM (E.D. Cal. Sept.  
19 19, 2008 Order and F&Rs that Defendants’ Motion to Dismiss be granted for failing to state a  
20 claim [ECF No. 42]); (E.D. Cal. Oct. 31, 2008 Order Adopting F&Rs and Dismissing action  
21 for failing to state a claim [ECF No. 44]) (strike five);

22 6) *Wilson v. Dovey, et al.*, Civil Case No. 2:06-cv-02553-JKS-EFB (E.D. Cal. Aug.  
23 31, 2007 F&Rs re dismissal of action for failure to state a claim per 28 U.S.C. § 1915A [ECF  
24 No. 13]; (E.D. Cal. March 11, 2008 Order adopting F&Rs and dismissing action with prejudice  
25 for failure to state a claim [ECF No. 18]) (strike six);

26 7) *Wilson v. Director of Adult Institutions, et al.*, Civil Case No. 2:08-cv-02904-  
27 WBS-GGH (E.D. Cal. March 25, 2009 Order and F&Rs re dismissal of action as “wholly

28 / / /

frivolous [ECF No. 13]); (E.D. Cal. April 24, 2009 Order adopting F&Rs, dismissing action and closing case) [ECF No. 19]) (strike seven); and

8) *Wilson v. Fitter, et al.*, Civil Case No. 2:09-cv-01162-DDP-RNB (C.D. Cal., West. Div.- Los Angeles Nov. 5, 2009 Report & Recommendation (“R&R”) to Grant Defendants’ Motion to Dismiss Third Amended Complaint for failure to state a claim pursuant to FED.R.CIV.P. 12(b)(6) [ECF No. 31]); (C.D. Cal. Sept. 30, 2010 Order Adopting R&R and Granting Motion to Dismiss action with prejudice [ECF No. 34]) (strike eight).

Accordingly, because Plaintiff has, while incarcerated, accumulated far more than the three “strikes” permitted pursuant to § 1915(g), and he fails to make a “plausible allegation” that he faced imminent danger of serious physical injury at the time he filed his Complaint, he is not entitled to the privilege of proceeding IFP in this action. *See Cervantes*, 493 F.3d at 1055; *Rodriguez*, 169 F.3d at 1180 (finding that 28 U.S.C. § 1915(g) “does not prevent all prisoners from accessing the courts; it only precludes prisoners with a history of abusing the legal system from continuing to abuse it while enjoying IFP status”); *see also Franklin v. Murphy*, 745 F.2d 1221, 1231 (9th Cir. 1984) (“[C]ourt permission to proceed IFP is itself a matter of privilege and not right.”).<sup>1</sup>

### III.

#### Conclusion and Order

For the reasons set forth above, the Court hereby:

1) **DENIES** Plaintiff’s Motion to Proceed IFP [ECF No. 5] pursuant to 28 U.S.C. § 1915(g);

2) **DISMISSES** this action without prejudice for failure to pay the \$350 civil filing fee required by 28 U.S.C. § 1914(a), and

///

---

<sup>1</sup> The Central District of California has also precluded Plaintiff from proceeding IFP pursuant to 28 U.S.C. § 1915(g) absent allegations of “imminent danger of serious physical injury.” *See Wilson v. Haws*, Civil Case No. 2:07-cv-08019-UA-RNB (C.D. Cal., West. Div., Los Angeles Dec. 19, 2007 Order to Show Cause why request to proceed IFP should not be denied pursuant to 28 U.S.C. § 1915(g) [ECF No. 2]; (C.D. Cal. Feb. 12, 2008 Order Denying Plaintiff’s Request to Proceed IFP pursuant to 28 U.S.C. § 1915(g) [ECF No. 4]).

